

SESSION III

THE LEGAL ENVIRONMENT

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Upon successfully completing this session, the participant will be able to:

- o State and discuss the elements of DWI offenses.
- o Discuss the provisions of the implied consent law.
- o Discuss the relevance of chemical test evidence.
- o Discuss precedents established through case law.

CONTENT SEGMENTS

- A. Basic DWI Statute: Driving While Under The Influence
- B. Implied Consent Law and Presumptions
- C. Illegal Per Se Statute: Driving With A Proscribed Blood Alcohol Concentration
- D. Preliminary Breath Testing
- E. Case Law Review

LEARNING ACTIVITIES

- o Instructor-Led Presentation
- o Reading Assignments

INTRODUCTION

An understanding of impaired driving laws that apply in your jurisdiction is critical to DWI enforcement.

All states (and many local jurisdictions) have their own impaired driving laws. While the specific language of these laws may vary significantly, most include the following provisions:

- o a Basic DWI Law;
- o an Implied Consent Law;
- o an Illegal Per Se Law;
- o a Preliminary Breath Testing Law.

In the following pages these four types of impaired driving laws are discussed in detail. The illustrations provided are drawn from the Uniform Vehicle Code. **You are responsible for learning whether and how each law applies in your jurisdiction.**

BASIC DWI LAW

A state's basic DWI statute may be subtitled Driving While Under the Influence, or something similar. Typically the statute describes the who, what, where and how of the offense in language such as this:

“It is unlawful for any person to operate or be in actual physical control of any vehicle within this state while under the influence of alcohol and/or any drug.”

ARREST

In order to arrest someone for a basic DWI violation, a law enforcement officer must have probable cause to believe that all elements of the offense are present. That is, the officer must believe that:

- o the person in question
- o was operating or in actual physical control of
- o a vehicle (truck, van, automobile, motorcycle, even bicycle, according to specific provisions in various states)
- o while under the influence of alcohol, another drug, or both.

Note: In some states it is unlawful to operate a vehicle while impaired anywhere in the State: on or off roadways, on private property, and so on. In other states, the law applies only on publicly accessible roadways.

CONVICTION

In order to convict a person of DWI, it is necessary to establish that all four elements were present. With regard to under the influence, courts have generally held that phrase to mean that the ability to operate a vehicle has been affected or impaired. To convict a person of a basic DWI violation, it is usually necessary to show that the person's capability of safely operating the vehicle has been impaired. If DWI is a criminal offense, the facts must be established "beyond a reasonable doubt." If DWI is an infraction, the standard of proof may be less. In either case, it is the officer's responsibility to collect and to thoroughly document all evidence.

IMPLIED CONSENT LAW

DESCRIPTION

The question of how much impairment in the ability to operate a vehicle will equate with driving while under the influence is not completely clear. Some courts have held that the slightest degree of impairment to the ability to drive means the driver is "under the influence." Other courts have held that there must be evidence of substantial impairment to the ability to drive before DWI conviction is warranted. Therefore, proving that a driver was "under the influence" has been (and continues to be) difficult.

To help resolve this difficulty, states have enacted Implied Consent Laws. The principal purpose of the Implied Consent Law is to encourage people arrested for DWI to submit to a chemical test to provide scientific evidence of alcohol influence. The Implied Consent Law usually includes language similar to the following:

Any person who operates or is in actual physical control of a motor vehicle upon the public highways of this state shall be deemed to have given consent to a chemical test for the purpose of determining the alcohol and/or drug content of blood when arrested for any acts alleged to have been committed while the person was operating or in actual physical control of a vehicle while under the influence of alcohol and/or any drug.

The Implied Consent Law states drivers must submit to a chemical test(s). The law provides penalties for refusal to submit to the test. The law also provides that the individual's driver's license may be suspended or revoked if the refusal is found to be unreasonable. Including a provision for license suspension or revocation as a means of encouraging those arrested for DWI to submit to the test so that valuable chemical evidence may be obtained.

LEGAL PRESUMPTIONS

Legal presumptions define the significance of the scientific chemical test evidence. Generally the Implied Consent Law provides an interpretation or presumption for the chemical test evidence like the following:

For Example: If the chemical test shows that the person's blood alcohol concentration (BAC) is ____ or more it shall be presumed that the person is under the influence. If the test shows that the BAC is ____ or less, it shall be presumed that the person is not under the influence. If the test shows that the BAC is more than ____ but less than ____, there is no presumption as to whether the person is or is not under the influence.

NOTE: These laws vary from state to state. Be aware of your state's law.

The weight of the chemical test evidence is presumptive of alcohol influence, not conclusive.

If there is no evidence to the contrary, the court may accept the legal presumption and conclude that the driver was or was not impaired on the basis of the chemical test alone. However, other evidence, such as testimony about the driver's appearance, behavior or speech, for example, may be sufficient to overcome the presumptive weight of the chemical test.

It is possible for a person whose BAC at the time of arrest is above the per se or presumptive level legal limit to be acquitted of DWI. It is also possible for a person whose BAC at the time is below the per se or presumptive level to be convicted of DWI. Consider the following examples:

Example 1

A driver is arrested for DWI. A chemical test administered to the driver shows a BAC of 0.13 . At the subsequent trial, the chemical test-evidence is introduced. In addition, the arresting officer testifies about the driver's appearance, behavior and driving. The testimony is sketchy, confused and unclear.

Another witness testifies that the driver drove, behaved and spoke normally. The court finds the driver not guilty of DWI.

Example 2

A driver is arrested for DWI. A chemical test administered to the driver shows a BAC of 0.05 . At the subsequent trial, the chemical test evidence is introduced. In addition, the arresting officer testifies about the driver's appearance, slurred speech, impaired driving and inability to perform divided attention field sobriety tests. The testimony is clear and descriptive. The court finds the driver guilty of DWI.

The difference in outcomes in the two examples cited is directly attributable to the evidence other than the chemical test evidence presented in court. Remember that the chemical test provides presumptive evidence of alcohol influence; it does not provide conclusive evidence. While the "legal limit" in a given jurisdiction may be 0.08/0.10 BAC, many people will demonstrate impaired driving ability long before that "limit" is reached.

ILLEGAL PER SE LAW

DESCRIPTION

Most states include in their DWI Law or Implied Consent Law a provision making it illegal to drive with a prescribed blood alcohol concentration (BAC). This provision, often called an Illegal Per Se Law, creates another alcohol-related driving offense which is related to, but different from the basic DWI offense. Following is a typical Illegal Per Se Provision:

“It is unlawful for any person to operate or be in actual physical control of any vehicle within this state while having a blood alcohol concentration at or above state’s level.”

The Illegal Per Se Law makes it an offense in and of itself to drive while having a BAC at or above state’s level. To convict a driver of an Illegal Per Se Violation, it is sufficient to establish that the driver's BAC was at or above state’s level while operating a vehicle in the state. It is not necessary to establish that the driver was impaired.

NOTE: These laws vary from state to state. Know your state's law.

The Illegal Per Se Law does not replace the basic DWI law. Rather, the two work together. Each defines a separate offense:

- o The basic DWI Law makes it an offense to drive while under the influence of alcohol and/or any drug.
- o The Illegal Per Se Law makes it an offense to drive while having more than a certain percentage of alcohol in the blood.

For the basic DWI offense, the chemical test result is presumptive evidence. For the Illegal Per Se offense, the chemical test result is conclusive evidence.

PURPOSE

The principal purpose of the Illegal Per Se Law is to aid in prosecution of drinking and driving offenders. The law reduces the state's burden of proof. It is not necessary for the prosecutor to show that the driver was "under the influence." The state is not required to demonstrate that the driver's ability to drive was affected. It is sufficient for the state to show that the driver's BAC was at or above state's level.

While the statute aids in prosecution, it does not really make drinking and driving enforcement easier. An officer must still have probable cause to believe that the driver is impaired before an arrest can be made. The Implied Consent Law usually requires that the driver already be arrested before consenting to the chemical test. The law also requires that the arrest be made for "acts alleged to have been committed while operating a vehicle while under the influence." Therefore, the officer generally must establish probable cause that the offense has been committed and make a valid arrest before the chemical test can be administered.

SUMMARY

Police officers dealing with impaired driving suspects must continue to rely primarily on their own powers of detection to determine whether an arrest should be made. Usually it is impossible to obtain a legally admissible chemical test result until after the driver has been arrested. Sometimes drivers will refuse the chemical test after they have been arrested. Then the case will depend strictly upon the officer's observations and testimony. When making a DWI arrest, always assume that the chemical test evidence will not be available. It is critical that you organize and present your observations and testimony in a clear and convincing manner. In this way, more drivers who violate drinking and driving laws will be convicted, regardless of whether they take the chemical tests, and regardless of the test results.

PRELIMINARY BREATH TEST LAW

DESCRIPTION

Many states have enacted preliminary breath testing (PBT) laws. These laws permit a police officer to request a driver suspected of DWI to submit to an on-the-spot breath test prior to arresting the driver for DWI. PBT laws vary significantly from one state to another. A typical statute reads as follows:

“When an officer has reason to believe from the manner in which a person is operating or has operated a motor vehicle that the person has or may have committed the offense of operating while under the influence, the officer may request that person to provide a sample of breath for a preliminary test of the alcohol content of the blood using a device approved for this purpose.”

APPLICATION

PBT results are used to help determine whether an arrest should be made. The results usually are not used as evidence against the driver in court. However, PBT laws may provide statutory or administrative penalties if the driver refuses to submit to the test. These penalties may include license suspension, fines or other sanctions.

HISTORY OF CASE LAW

The following cases are landmark court decisions relevant to the admissibility of Standardized Field Sobriety Tests (SFSTs) including Horizontal Gaze Nystagmus (HGN). Challenges to the admissibility have been based on (1) scientific validity and reliability; (2) relationship of HGN to specific BAC level; (3) officer training, experience, and application.

- o The State of Arizona (Petitioner)
v.
The Superior Court of the State of Arizona,
in and for the county of Cochise, and the
Hon. James L. Riles, Division III (Respondent)
and
Frederick Andrew Blake (Real Party in Interest)

No. 18343-PR
Court of Appeals
No. 2 CA-SA 0254
Cochise Co.
No. 11684
April 7, 1986

The Blake case established a very important precedent in Arizona. The trial court ruled that the HGN test was not reliable under Frye v. United States, 293 F.2d 1013 (DC Cir. 1923) and thus could not be used as part of probable cause. The case was dismissed by the trial court. This ruling was appealed by the state and the order of dismissal was reversed by the court of appeals and the case was remanded for further proceedings (7/25/85).

The appellate court decision was reviewed by the State Supreme Court. The State Supreme Court approved the court of appeal's opinion, as modified, and vacated the trial court's dismissal of the Blake prosecution for DWI and remanded the case for proceedings not inconsistent with its opinion.

Following is a summary of the facts of the case and a brief overview of the appellate court and Supreme court opinions.

FACTS: After the defendant was stopped for DUI, he was given field sobriety tests on which he did fair. The officer also administered a Horizontal Gaze Nystagmus (HGN) test and estimated that defendant's blood alcohol content was .17. The intoxilizer showed a .163 reading. At the motion to suppress, the state presented testimony from the SCRI project director which originally researched the HGN test.

The researchers found that they could determine whether a person was above or below a .10 blood alcohol level 80% of the time. Finnish researchers had reached the same results. The project director testified that HGN has been accepted by various researchers, various police agencies and the National Highway Traffic Safety Administration. The police officer who helped develop and standardize HGN testified about his field experience with HGN and his work in the research on HGN. The officer testified that HGN was particularly useful in detecting drivers who had over .10 alcohol in their blood who would otherwise pass the field sobriety tests. The Arizona officer who administers HGN training testified that experienced drinkers with .13 or .14 reading could pass the other field sobriety tests and evade arrest. He testified that to be certified for HGN the officer had to perform 35 practice tests and then had to pass an exam where they must determine the blood alcohol level of suspects within .02 four out of five times. The training officer also testified that the officer must continue to use the test regularly in the field and should be evaluated to make sure the officer maintains his proficiency. The arresting officer testified that he was certified as an HGN specialist. The arresting officer testified without HGN results, he did not think he had probable cause to arrest the defendant. The trial court ruled that the HGN test was not reliable under Frye v. United States and thus could not be used as part of probable cause. Accordingly, the court dismissed the prosecution. The STATE appealed this decision.

ISSUE: Did the trial court err in excluding the HGN evidence?

RULING: Yes, "We conclude that the record shows not only that the HGN is sufficiently reliable to provide probable cause for arrest, but that with the proper foundation as to the expertise of the officer administering it, testimony concerning the administration of the test and its results is admissible at trial. The record shows that the HGN test has gained general acceptance in the field in which it belongs." The court went on to say that they were unable to rule on whether the results of this particular HGN test would be admissible because the only evidence about the officer's proficiency was his testimony that he was certified. The court of appeals noted that the officer kept a log of when he administered the test and said, "This log would be useful if it demonstrated that (the arresting officer) was as proficient in the field as he was on the examination." The order of dismissal is reversed and the case is remanded for further proceedings.

Mr. Blake sought review of the court of appeals opinion and it was granted by the Arizona Supreme Court.

ISSUES:

- (1) Whether the HGN test is sufficiently reliable to establish probable cause to arrest for DWI, and
- (2) Whether HGN test results are sufficiently reliable to be introduced in evidence at trial.

CONCLUSION: "We find that the Horizontal Gaze Nystagmus test properly administered by a trained police officer is sufficiently reliable to be a factor in establishing probable cause to arrest a driver for violating A.R.S.28-692(B). We further find that the Horizontal Gaze Nystagmus test satisfies the Frye test for reliability and may be admitted in evidence to corroborate or attack, but not to quantify, the chemical analysis of the accused's blood alcohol content. It may not be used to establish the accused's level of blood alcohol in the absence of a chemical analysis showing the proscribed level in the accused's blood, breath or urine. In subsection (A) prosecutions it is admissible, as is other evidence of defendant's behavior, to prove that he was "under the influence."

We approve the court of appeals' opinion, as modified, vacate the trial court's dismissal of the Blake prosecution for violation of A.R.S.28-792(B), and remand for proceedings not inconsistent with this opinion.

A detailed analysis of the facts reviewed by the Supreme Court is contained in the opinion. PEOPLE vs. LOOMIS (California, 1984) 156 Cal. App. 3d 1, 203 Cal. Rptr. 767 (Cal. Super. 1984)

The arresting officer attempted to testify to his opinion concerning the suspect's BAC, in quantitative terms, based solely on the angle of onset of HGN. The suspect had refused to submit to a chemical test. The court held that the officer was not entitled to testify as either a lay or expert witness about HGN, or to give his opinion about the defendant's BAC. The court held that HGN is a new form of scientific evidence, that will be allowed only when there is a preliminary showing of its general acceptance in the scientific community. Moreover, it was clear from the officer's testimony that he had not been formally or properly trained in HGN, and didn't really understand how the test is to be given.

STATE vs. BLAKE (Arizona, 1986) 718 P.2d 171 (Arizona, 1986); see also State vs. Superior Court of County of Cochise, 149 Ariz 269, 718 P.2d 171, 60 ALR 4th, 1103.

This is the landmark ruling on HGN because it was the first case decided at a State Supreme Court. The Arizona Supreme Court found that HGN satisfies the Frye standards for evidence to corroborate, or attack, the issue of a suspect's impairment.

The Frye standards are those set by the U.S. Supreme Court to govern the admissibility of "new" scientific evidence. In effect, the Arizona Supreme Court took judicial notice of HGN, so that it is no longer necessary, in Arizona, to introduce expert scientific testimony to secure the admissibility of HGN. However, the court did set standards governing the training of officers who would be qualified to testify about HGN, and the court explicitly ruled that HGN cannot be used to establish BAC quantitatively in the absence of a chemical test.

STATE vs. MURPHY (Iowa, 1990)

The court held that the results of a HGN test could be admitted into evidence at a DWI trial to prove the intoxication of the driver. (Not to be used to determine specific BAC level.) The court considered HGN to be one of the SFST's officers administer and in this case the officer was properly trained to administer the test. The court felt that the officer did not have to qualify as an expert witness because the observations were objective in nature and the officer needed no special qualifications to be able to interpret the results.

STATE v. HOMAN (732 N.E.2d 952, OHIO 2000)

This significant State Supreme Court case held that Standardized Field Sobriety Tests (SFSTs) conducted in a manner that departs from the methods established by the National Highway Traffic Safety Administration (NHTSA) "are inherently unreliable". The court determined that the administration of the SFSTs, including the one-leg stand and walk-and-turn tests, must be performed in strict compliance with the directives issued by NHTSA.

The court concluded that because the arresting officer admitted to not having strictly complied with established police procedure during the administration of the HGN and walk-and-turn tests, the results of the SFSTs must be excluded. In contrast with other court rulings, the *HOMAN* court found “*it is well established that in field sobriety testing even minor deviations from the standardized procedures can severely bias the results.*” This decision was based upon an older edition of this manual where an ambiguous phrase was strictly interpreted by the court. The phrase in question only applied to the use of SFSTs for training purposes.

SMITH vs. WYOMING (Wyoming, 2000)

The State Supreme Court held a law enforcement officer may testify to the results of field sobriety tests (including HGN) if it is shown that the officer has been adequately trained in the administration and assessment of those field sobriety tests, and conducted them in substantial accordance with that training. The court further stated “*deficiencies in the administration of the sobriety tests go to the weight accorded the evidence and not to its admissibility.*”

TO SUMMARIZE:

The prevailing trend in court is to accept HGN as evidence of impairment, provided the proper scientific foundation is laid. However, courts consistently reject any attempt to derive a quantitative estimate of BAC from nystagmus. Additionally, officers should recognize the relevance of administering the Standardized Field Sobriety Tests in accordance with the NHTSA guidelines.

The National Traffic Law Center (NTLC) has a list of every state’s Appellate Court/ Supreme Court case addressing HGN and SFST issues. The materials are available to law enforcement at www.ndaa.org/apri/NTLC or by phone (703) 549-4253.

TEST YOUR KNOWLEDGE

INSTRUCTIONS: Complete the following sentences.

1. The elements of the Basic DWI Law are:
 - a. _____
 - b. _____
 - c. _____
 - d. _____
2. If DWI is a criminal offense, the standard of proof is _____

3. The purpose of the Implied Consent Law is _____

4. Under the Implied Consent Law, chemical test evidence is _____
_____ evidence.
5. The Illegal Per Se Law makes it unlawful to _____

6. The PBT law permits a police officer to request a driver suspected of DWI to _____

7. PBT results are used to help determine _____
